The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL:	SB 1474
INTRODUCER:	Senator Thrasher
SUBJECT:	Emergency Health Care Providers
DATE:	March 22, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Wilson	HR	**Favorable**
2.	Emrich/Burgess	Burgess	BI	**Pre-meeting**
3.			JU	
4.			HA	
5.				
6.				

I. Summary:

The bill extends sovereign immunity to emergency health care providers that are providing emergency services and care in a hospital or pursuant to prehospital treatment or transport for an emergency medical condition, and that are not covered already under the provisions related to sovereign immunity. These emergency health care providers are designated as agents of the state for purposes of s. 768.28, F.S., related to the waiver of sovereign immunity.

The bill requires these emergency health care providers to indemnify the state for any judgments, settlement costs, or other liabilities incurred up to the liability limits of $100,000 per claim or judgment, not to exceed $200,000 for all claims or judgments arising out of the same incident or occurrence. If an emergency health care provider fails to indemnify the state or enter into a repayment agreement, the provider's license is subject to an emergency suspension order and additional administrative discipline. If the emergency health care provider is a health care facility, any state funds payable to the licensed facility must be withheld until the facility satisfies its obligation to indemnify the state or enters into a repayment agreement and pays an administrative fine.

The Division of Risk Management (DRM) has estimated the fiscal impact of the bill to the State of Florida to be $34,549,532. This estimate is very conservative and is limited to an estimate of defense costs and recovery amounts for 436 emergency room medical malpractice closed claims for 2008. This projection does not include medical malpractice costs associated with pre-emergency room personnel, i.e., ambulance, EMS, and paramedics, or post-emergency room personnel, i.e., hospital doctors and nurses. It also does not include any estimate of the financial obligations above the $100,000/$200,000 sovereign immunity caps that involve the legislative

claim bill process.[1] Passage of a claim bill is the only means by which an injured party may recover monetary damages in excess of the sovereign immunity limits.

The bill takes effect upon becoming a law and applies prospectively.

This bill substantially amends the following section of the Florida Statutes: 768.28.

II. Present Situation:

Sovereign Immunity Generally
The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state.

Under this law, officers, employees and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to $100,000 for one incidence and limits all recovery related to one incidence to a total of $200,000. For purposes of this analysis, when the term sovereign immunity it used, it means the application of sovereign immunity and the limited waiver of sovereign immunity as provided in s. 768.28, F.S.

There are 205 hospitals in the state with a dedicated emergency department (ED).[2] Some hospital EDs and physicians employed in those EDs are currently covered by sovereign immunity. There are 34 public hospitals in the state that are part of the state or a county, hospital district, or hospital authority with sovereign immunity. In addition, attending physicians and resident physicians affiliated with state universities have sovereign immunity.

Extension of Sovereign Immunity to Agents
Agents are generally covered under the provisions of sovereign immunity based upon a contractual relationship, such as in s. 766.1115, F.S., related to the Access to Health Care Act, or as a volunteer to a state agency, such as in part IV of ch. 110, F.S.

[1] In general, a claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.
[2] See the Hospital ER Services list as of 2/1/2010 published by the Agency for Health Care Administration, available at: <http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Hospital_Outpatient/forms/HospitalERServicesInventory.pdf> (Last visited on March 2, 2010).

When enacting the Access to Health Care Act, the Legislature enumerated the following findings and intent. The Legislature found that a significant proportion of the residents of this state who are uninsured or Medicaid recipients are unable to access needed health care because health care providers fear the increased risk of medical negligence liability. The Legislature intended that access to medical care for indigent residents be improved by providing governmental protection to health care providers who offer free quality medical services to underserved populations of the state. Therefore, it is the intent of the Legislature to ensure that health care professionals who contract to provide such services as agents of the state are provided sovereign immunity.

The required contract, among other things, provides a framework to allow the health care provider to deliver health care services to low-income recipients as an agent of the governmental entity. The contract must be for volunteer, uncompensated services. For services to qualify as volunteer, uncompensated services under this section, the health care provider must receive no compensation from the governmental entity for any services provided under the contract and must not bill or accept compensation from the recipient, or any public or private third-party payor, for the specific services provided to the low-income recipients covered by the contract.

In addition, the contract must provide that: the right of dismissal of the health care provider is retained by the governmental entity; the governmental entity has a right of access to patient records; the health care provider must report adverse incidents and treatment outcomes; patient selection and referral must be made solely by the governmental entity; and the provider is subject to supervision and inspection by the governmental entity.

Section 766.1115, F.S., requires the governmental entity to provide written notice to all clients that the health care provider is an agent of the governmental entity and that the exclusive remedy for any injury is under s. 768.28, F.S. The governmental entity must establish a quality assurance program to monitor health services provided under s. 766.1115, F.S.

Under the school health services program, health care entities receive a limitation on their civil liability under the doctrine of sovereign immunity. Under s. 381.0056(10), F.S., any health care entity that provides school health services under contract with the Department of Health (DOH) under a school health services plan developed under the act, and as part of a school nurse service public-private partnership, is deemed to be a corporation acting primarily as an instrumentality of Florida solely for the purpose of limiting liability under s. 768.28(5), F.S. The limitations on tort actions in s. 768.28(5), F.S., must apply to any action against the entity with respect to the provision of school health services, if the entity is acting within the scope of and pursuant to guidelines established in the contract or by rule of the DOH. The contract must require the entity, or the partnership on behalf of the entity, to obtain general liability insurance coverage, with any additional endorsement necessary to insure the entity for liability assumed by its contract with the DOH.

Additional persons identified in s. 768.28, F.S., are designated as agents for purposes of sovereign immunity. These include:

- A Florida Health Services Corps member while providing uncompensated services to medically indigent persons who are referred by the DOH;
- A public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator;

- Health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Regional poison control centers that are coordinated and supervised under the DOH. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Operators, dispatchers, and providers of security for rail services and rail facility maintenance providers in the South Florida Rail Corridor, or any of their employees or agents, that are under contract with the South Florida Regional Transportation Authority or the Department of Transportation;
- A professional firm and its employees that provide monitoring and inspection services of state roadway, bridge, or other transportation facility construction projects pursuant to a contract with the Department of Transportation. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Providers and vendors, and their employees or agents, under contract with the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity; and
- Certain health care practitioners, under contract with a state university board of trustees to provide medical services to student athletes. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity.

When not specified in statute, the existence of an agency relationship is generally a question of fact to be resolved by the fact finder based on the facts and circumstances of a particular case. The factors required to establish an agency relationship are: acknowledgment by the principal that the agent will act for him; the agent's acceptance of the undertaking; and control by the principal over the actions of the agent.[3]

Emergency Services and Care Provisions

Section 395.1041, F.S., requires every hospital that has an emergency department (ED) to provide emergency services and care to any person upon request, or when emergency services and care are requested on behalf of a person, without regard to the person's race, ethnicity, religion, national origin, citizenship, age, sex, preexisting medical condition, physical or mental handicap, insurance status, economic status, or ability to pay for medical services. Emergency services and care means appropriate screening, examination, and evaluation to determine if an emergency medical condition[4] exists and, if it does, the care, treatment, or surgery by a physician

[3] See *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990); *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265, 1268; and *Theodore ex rel. Theodore v. Graham*, 733 So2d 538 (Fla 4th DCA), rev. denied, 737 So.2d 551 (Fla. 1999), where the court determined that the government did not retain actual control or the right to control the physician's professional judgment over patient treatment decisions.

[4] An emergency medical condition means a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following: (1) serious jeopardy to patient health, including a pregnant woman or fetus; (2) serious impairment of bodily functions; or (3) serious dysfunction of any bodily organ or part. With respect to a pregnant woman this includes: (1)

necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility. These services must be provided *at all times* unless the Agency for Health Care Administration (Agency) has granted an exemption. Hospitals are required to maintain a list of "on-call" critical care physicians (specialists) available to the hospital.[5]

The Federal Emergency Medical Treatment and Labor Act[6] (EMTALA) was enacted to ensure public access to emergency services regardless of a person's ability to pay and applies to a hospital with an ED that participates in the Medicare program. Most Florida hospitals participate in Medicare. Similar to Florida's access to emergency services and care law, EMTALA specifies that a hospital with an ED must provide for an appropriate medical screening examination to determine whether an emergency medical condition exists for any individual who comes to an ED and requests examination or treatment of a medical condition. If an emergency medical condition exists, the hospital must provide, within the staff and facilities available at the hospital, further medical examination and treatment as may be required to stabilize the medical condition for transfer of the patient to another medical facility or discharge. In this context, to stabilize means that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from the facility or that a pregnant woman has delivered the child and the placenta. In certain situations, a patient who is not stabilized may be transferred to another hospital.

Section 401.45, F.S., relating to emergency medical services, provides that a person may not be denied needed prehospital treatment or transport. In addition, this section provides that a general hospital or a specialty hospital that has an emergency room may not deny a person treatment for any emergency medical condition that will deteriorate from a failure to provide such treatment.

Physician Availability in Emergency Departments

The availability of physicians, especially physician specialists, in hospital EDs has been a concern in Florida and nationwide for several years. The Florida Senate Committee on Health Regulation studied this situation in the 2007-2008 interim and issued Interim Project Report 2008-138, *Availability of Physicians and Physician Specialists for Hospital Emergency Services and Care* in November, 2007.[7] The report found that there are multiple reasons why physicians are unavailable for on-call coverage in hospital EDs and the problem varies by locality, specialty, and hospital. However, in general, physicians are reluctant to provide emergency on-call coverage due to the negative impact on their lifestyle, the perceived hostile medical malpractice climate, and the inability to obtain adequate compensation for services rendered. All of these reasons are disincentives to assuming liability for treating emergency patients previously unknown to the physician. In some cases, however, the problem is simply an inadequate supply of a particular type of specialist in the market.

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that there is inadequate time to effect safe transfer to another hospital prior to delivery; (2) that a transfer may pose a threat to the health and safety of the patient or fetus; or (3) that there is evidence of the onset and persistence of uterine contractions or rupture of the membranes. See s. 395.002(8), F.S.

[5] Rule 59A-3.255(6), Florida Administrative Code.

[6] Section 1867 of the Social Security Act, 42 U.S.C. s 1395dd.

[7] This report is available at:< http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-138hr.pdf > (Last visited on March 2, 2010). An addendum to the report was subsequently published and is available at: <http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-138ahr.pdf> (Last visited on March 2, 2010).

Good Samaritan Act
Under the Good Samaritan Act in s. 768.13, F.S., a health care provider, including a hospital, providing emergency services imposed under the three emergency services and care provisions, s. 395.1041, F.S., EMTALA, or prehospital treatment or transport services in s. 401.45, F.S., has limited tort liability. Under this law, a health care provider is only liable for damages resulting from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another.

Limitation of Noneconomic Damages
Section 766.118(4) and (5), F.S., provides for a limitation on noneconomic damages for the negligence of practitioners and nonpractitioners providing emergency services and care, emergency medical services, or services pursuant to the EMTALA requirements to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition. The limitation applies to practitioners and nonpractitioners who are not covered by sovereign immunity under s. 768.28, F.S.

Under this provision, the noneconomic damages are limited to $150,000 per claimant, with the total recoverable by all claimants limited to $300,000 in a cause of action for personal injury or wrongful death arising from medical negligence of practitioners. The noneconomic damages are limited to $750,000 per claimant, with the total recoverable by all claimants limited to $1.5 million for defendants other than practitioners.

These limitations apply to noneconomic damages awarded as a result of any act or omission of providing medical care or treatment, including diagnosis, that occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient. If surgery is required as a result of the emergency within a reasonable time after the patient in stabilized, then these limitations apply to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery.

Statutory Immunity from Civil Liability
Florida law also provides for immunity from civil liability for certain persons in certain situations. These persons are not acting as instrumentalities of the state. Examples include:

- Section 768.13, F.S., related to the Good Samaritan Act, as it applies to any person, including those licensed to practice medicine, who gratuitously provide emergency care or treatment related to and arising out a declared emergency or the scene of an emergency outside of a place having proper medical equipment;
- Section 768.1325, F.S., related to the Cardiac Arrest Survival Act for certain persons using an automated external defibrillator device;
- Section 768.1345, F.S., related to immunity from a professional malpractice action when a licensed professional is providing professional services during a period of a declared emergency for which no compensation is sought or received;
- Section 768.135, F.S., related to a volunteer physician for a school athletic team;
- Section 768.1355, F.S., related to the Florida Volunteer Protection Act; and
- Section 768.137, F.S., related to protecting a farmer who gratuitously allows a person to enter upon his or her land to remove farm produce or crops remaining in the fields following the harvest.

Medical Malpractice Insurance & Claims

The Office of Insurance Regulation (OIR) publishes a report annually on medical malpractice insurance and claims.[8] According to the most recent report of 2008 data that was published on October 1, 2009:

- Florida medical malpractice insurance companies reported 3,336 closed claims in Florida (see page 37), down from 3,553 closed claims for 2007 and 3,811 closed claims for 2006, as reported in the October 1, 2008 and October 1, 2007 annual reports, respectively. Not all of these closed claims resulted in payment to the plaintiff (see page 42);
- As in previous reports, the most commonly reported claims location was hospital inpatient facilities with 1,584 claims closed. The emergency room ranked third in the injury location with 436 closed claims (see page 37);
- Twenty-two medical malpractice insurance writers constituted 80 percent of the Florida market in 2008 (page 3);
- The average approved rate for rate filings in the primary medical malpractice market (physicians and surgeons) was negative 7.1 percent in 2008 (page 3) and when rate changes with effective dates from December 2008 through the first half of 2009 are included, the physician and surgeon medical malpractice rate dropped by over 10 percent (pages 33-34);
- Despite Florida's population ranking as the fourth most populous state in the country, Florida's medical malpractice:
  - Earned premium ranked fifth behind New York, California, Pennsylvania, and Illinois (page 6), and
  - Direct losses incurred ranked sixth behind New York, Pennsylvania, Illinois, New Jersey, and California (page 6); and
- Florida's loss ratio (reported losses to earned premium) of 22.4 percent, dropped 15 percent since 2007 (page 7).

Division of Risk Management

The Division of Risk Management (DRM) within the Department of Financial Services is responsible for investigating and making appropriate dispositions of all general liability claims for damages filed against the state due to alleged negligent acts of state employees or agents of the state. When a state employee or agent whose acts are covered by sovereign immunity is sued, the DRM contracts with outside counsel to defend the lawsuit. For FY 2008-09, the DRM incurred $4,102,091 in attorney fees and expenses for general liability claims against the state.

Claim Bills

In general, a claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency. It is the means by which an injured party may recover damages in excess of the sovereign immunity caps of $100,000 and $200,000. Under s. 11.065, F.S., no claims against the state shall be presented to the Legislature more than 4 years after the cause for relief accrued and any claim presented after this time limitation shall be void and unenforceable. Further, all claim bills that are enacted by the Legislature shall be for payment in full in that no further claims for relief may be submitted to the Legislature in the future.

[8] Florida OIR 2009 Annual Report – October 1, 2009 *Medical Malpractice Financial Information Closed Claim Database and Rate Filings,* available at: <http://www.floir.com/pdf/MedicaMalReport10012009.pdf > (Last visited on March 2, 2010).

There are filing deadlines and rules in both the Senate and House of Representatives governing claim bills. Under Senate Rule 4.81(6) and House Rule 5.6(c), the Legislature will not process a contested claim bill until the claimant has exhausted all available administrative and judicial remedies; however, both bodies may consider a bill in which the parties have executed a written settlement agreement.

III. Effect of Proposed Changes:

This bill extends the protection of sovereign immunity to all emergency health care providers, as defined in the bill, by statutorily designating these providers as governmental agents. This includes licensed professionals, nonprofessionals, and health care facilities involved in providing emergency services and care in any hospital emergency department or as a part of the services, such as basic and advanced life support transportation, provided by emergency medical service providers.

Under this bill, an emergency health care provider will only be personally liable or named as a party defendant if the agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton disregard of human rights, safety, or property. The state will defend the claim and assume the related costs. If the emergency health care provider did not act in bad faith, etc., and is not personally liable, the maximum amount an emergency health care provider will be required to pay is $100,000 per person and $200,000 per incident to indemnify the state for this portion of costs related to the claim that is incurred by the state. The state may assume additional responsibility under the claims bill process for excess judgments.

Without this bill, an emergency health care provider that is not otherwise covered by sovereign immunity (such as an employee of a public hospital, practitioner or resident affiliated with a state university, and certain providers under contract with governmental entities) is only liable for damages under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another in accordance with the Good Samaritan Act. The limitation on noneconomic damages applies.

Because the emergency health care provider is not personally liable or named as a party defendant, claims that are covered under the sovereign immunity provisions are not counted as medical malpractice under s. 26, Art. X, of the Florida Constitution, that could otherwise subject a practitioner to the loss of his or her professional license as a medical doctor after three incidents of medical malpractice.

Section 1. Provides Legislative findings and intent as follows:

- It is vital that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to everyone in need of such care;
- Providers of emergency services and care are critical elements in responding to disaster and emergency situations that may affect local communities, the state, and the country;
- It is important to maintain a viable system of providing for the emergency medical needs of the state's residents and visitors;
- Providers of emergency medical services and care are required by federal and state law to provide emergency services and care to all persons who present themselves to hospitals seeking such care;

- Florida law further requires that emergency medical treatment may not be denied by emergency medical services providers;
- These requirements impose a unilateral obligation for providers of emergency services and care to provide these services without ensuring payment or other consideration for the provision of this care;
- These providers provide a significant amount of uncompensated emergency medical care in furtherance of the governmental interest;
- A significant proportion of the residents of this state who are uninsured or are Medicaid or Medicare recipients are unable to access needed health care on an elective basis because health care providers fear the increased risk of medical malpractice liability;
- Such patients are frequently forced to seek care through providers of emergency medical services and care;
- Providers of emergency medical services and care in this state have reported significant problems with respect to the affordability of professional liability insurance, which is more expensive in this state than the national average;
- A significant number of specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital EDs due to increased exposure to medical malpractice liability created by treating such emergency department patients, thereby creating a void that has an adverse effect on emergency patient care; and
- Hospitals, emergency medical services providers, and physicians must be able to ensure that patients who present themselves to hospitals for emergency medical services treatment and care have access to such needed services.

Section 2. Amends s. 768.28, F.S., to expand the definition of an officer, employee, or agent for purposes of sovereign immunity and the waiver of sovereign immunity to include any emergency health care provider acting pursuant to obligations imposed by s. 395.1041, F.S., (the state's access to emergency services and care law) or s. 401.45, F.S., (the mandate for prehospital treatment and transport). This group of emergency health care providers excludes persons or entities that are otherwise covered under this section.

The bill defines:

- "Emergency health care providers" to include all persons and entities providing services pursuant to obligations imposed by s. 395.1041, F.S., (the state's access to emergency services and care law) or s. 401.45, F.S., (the mandate for prehospital treatment and transport), except those persons or entities that are otherwise covered under this section; and
- "Emergency medical services" to mean all screenings, examinations, and evaluations by a physician, hospital or other person or entity acting pursuant to obligations imposed by the state's access to emergency services and care law or the mandate for prehospital treatment and transport. It includes the care, treatment, surgery, or other medical services provided to relieve or eliminate the emergency medical condition, including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time. (See comment under Technical Deficiencies.)

The bill requires an emergency health care provider that is covered under this statutory extension of the status of governmental agent to indemnify the state for any judgments, settlement costs, or

other liabilities incurred, up to $100,000 per person with a maximum of $200,000 per incident after reasonable notice and a written demand to do so.

The DOH is required to issue an emergency suspension order for the license of an emergency health care provider who does not indemnify the state or enter into a repayment plan. The emergency suspension order must be issued within 30 days after the DOH receives a notice from the Division of Risk Management of the Department of Financial Services that the licensee has failed to satisfy his or her obligation pertaining to a judgment, settlement costs, or other liabilities incurred. In addition, a practitioner licensed within the Division of Medical Quality Assurance of the DOH, is subject to disciplinary action under his or her practice act and under the general provision regulating professions and occupations in s. 456.072(1)(k), F.S.

The state must withhold any state funds payable to an emergency health care provider licensed under ch. 395, F.S., related to hospitals and other licensed facilities, that fails to indemnify the state or enter into a repayment agreement with the state for its financial responsibility pertaining to a judgment, settlement costs, or other liabilities incurred. In addition, the Agency must impose an administrative fine, not to exceed $10,000 per violation, for failing to indemnify the state or enter into a repayment agreement.

Section 3. Provides that the act shall take effect upon becoming a law and it applies to any cause of action accruing on or after that date.

Other Potential Implications: No Florida case appears to have resolved a challenge to the status of a statutorily designated agent.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill, if enacted, would be subject to challenge as a violation of an individual's right of access to the courts. Article I, s. 21 of the Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. In order to withstand such a challenge, the extension of sovereign immunity (and the waiver thereto) to these health care providers would need to

meet the test announced by the Florida Supreme Court in *Kluger v. White*.[9] Under that case, the Legislature must provide a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill is intended to increase the availability of physicians to provide emergency services and care in a hospital or by emergency medical service providers in prehospital treatment and transport.

In 2007, approximately 7,124,068 individuals went to emergency departments in Florida. Residents in and visitors to Florida who need emergency services and care might have greater access to these services as a result of extending the doctrine of sovereign immunity to all providers of emergency services and care. In exchange, patients who are injured or wronged as a result of this treatment and care, will be subject to provisions in s. 768.28, F.S., related to the waiver of sovereign immunity.

Health care professionals and entities that are covered by the bill should receive a substantial reduction in medical malpractice premiums. The amount by which the premiums are reduced are indeterminate at this time. In addition, proponents of the bill state that over time, health care costs should decline significantly because the affected professionals will no longer be forced into the costly defensive medical practices that they believe are currently necessary.

Persons seeking compensation due to the negligence of emergency medical providers will have to exhaust all judicial and administrative remedies, and then proceed to file a claim bill and lobby for its passage before the Legislature.[10] The Legislature, in its discretion, does not have to hear the bill. The number of future claim bills that would be filed as a result of this bill is unknown. Passage of claim bills to compensate victims of emergency care malpractice will shift health care liability costs to the taxpayers.

C. Government Sector Impact:

The Division of Risk Management (DRM) estimates the fiscal impact of the bill to be $34,549,532. Under the bill, the DRM's cost to defend the lawsuits is not recoverable from the culpable ER medical provider, so the cost will be borne by the state. Risk

[9] *Kluger v. White*, 281 So.2d 1(Fla. 1973).
[10] Involving claims above the sovereign immunity monetary caps.

Management has estimated the defense cost to be $17,963,200, In addition, DRM will absorb uncollectibles and incur collection costs that it estimates to total $16,350,000. Proponents of the bill, however, point out that the risk of losing one's professional license is a very strong incentive for the individual to make full repayment to the state ($100,000/$200,000), so the collection cost may be overstated in this regard. Finally, DRM estimates that it will incur recurring costs of $236,332 to administer this process. The total of these costs is $34,549,532.

The basis for DRM's cost estimate appears to be conservative in that it does not encompass all of the individuals and entities that will be covered by the bill.[11] Further, DRM assumed that the non-defense loss adjustment expenses (LAEs) that it incurs will be recoverable, but that may not be fully clear in the bill. If DRM cannot recover those expenses, it will add approximately $9 million in costs to the state.

There will also be an indeterminate, but substantial fiscal impact to the state from awards or settlements for which the comparative culpability among the defendants is not clear. The State, the agency, or subdivision will be named as the defendant, and the individual culpable parties will not be named as defendants under the provisions of the bill. In cases where multiple individuals share culpability, if the presiding court does not assign comparative culpability, the state may have no means of recovering from the at fault parties without initiating a separate lawsuit. This difficulty could be compounded in cases involving multiple parties when a settlement is reached.

The costs associated with the claim bill procedures (i.e., filing a bill, employing lobbyists and attorneys, etc.) and the ultimate dollar amount paid out under such bills will be an expense to the state and cannot be recovered from the at fault parties.[12] Proponents of the bill point out that a cost is incurred only if the Legislature chooses to pass a claim bill. Accordingly, any cost arising from claim bills is indeterminant. Historically, however, the Legislature has made claim bill awards in most years, but has not considered all such bills.[13] Moreover, even if the Legislature chooses not to pass any claim bills arising from these malpractice awards, the state must still incur a modest cost in defending the claim bills that are filed.

VI. Technical Deficiencies:

Section 768.28, F.S., requires actions to be brought against the governmental entity or head of the governmental entity in her or his official capacity, of which the officer, employee, or agent is

[11] To estimate the aggregate defense costs, DRM used a rate of 436 claims per year from emergency room locations (as noted in the OIR medical malpractice report cited earlier in this analysis) and multiplied that rate by an average defense cost per claim of $50,000 (which is supported by the claim data in the OIR report). The bill, however, appears to affect many more people than just emergency room personnel, including ambulance and EMS personnel, post-ER care doctors and nurses, and post-ER follow-up surgeries when necessary.

[12] However, a claim bill may not pass the Legislature; see FN 13, below

[13] Over the most recent available 5 years, the State approved the following total claim bills: in 2008, 31 claim bills were filed, 11 became law, for a total of $18,500,825; in 2007, 35 claim bills were filed, 13 became law, for a total of $23,667,881; in 2006, 27 claim bills were filed, none became law; in 2005, 21 claim bills were filed, 1 became law, for $2,000,000; in 2004, 24 claim bills were filed, 6 became law, for $9,444,937. Since 1955, there have only been 2 years that the Legislature has not made an award under a claim bill.

an employee. It is not apparent from this bill, whether the concerned agency will be the Agency for Health Care Administration, the Department of Health, or some other agency.

Lines 114 – 118 appear unnecessary. They are redundant with lines 119 – 132 related to action by the DOH, and conflict with the remedies related to health care facilities licensed under ch. 395, F.S., in lines 133-142.

The term "emergency medical services" is defined in the bill for application to the term in s. 768.28(9), F.S. However, this term is not used within that subsection. As defined, this term appears to expand the medical care and treatment required under s. 395.1041, F.S., or s. 401.45, F.S.

VII. Related Issues:

This bill provides the protections under sovereign immunity for all emergency care and services provided. It does not delineate between patients with "adequate" medical insurance, those who are able to pay for emergency medical services received, and those who are uninsured, underinsured, or Medicaid or Medicare recipients. The Legislative findings and intent portion of the bill may not adequately articulate the overpowering public necessity in these instances to meet the test in *Kluger v. White.* (See the discussion under Other Constitutional Issues

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.